PP

v.

TEH ENG WAH

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CRIMINAL TRIAL NO: 45-38-98]
13 APRIL 1999

CRIMINAL PROCEDURE: *Prima facie case - Standard of proof - Whether fact that Criminal Procedure Code does not define 'prima facie' means accused ought to be given benefit of interpretation - Whether beyond reasonable test ought to be applied - What amounts to reasonable doubt - Contradictions and gaps in prosecution's evidence - Whether defence ought to be called*

CRIMINAL PROCEDURE: *Police investigation - Police officer's diary - Contradictions in police officers' evidence - Whether reference to diary ought to have been made - Whether failure to do so cannot be condoned*

EVIDENCE: *Documentary evidence - Computer printout - Condition precedent - What must be shown before printout deemed to be evidence of facts stated therein - Evidence Act 1950, ss. 90A(1) & 90A(2)*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Sections 37(d) and 37(g) - Presumptions - Driver of car containing drugs - Whether fact that driver in custody and control of car amounts to proof of possession*

EVIDENCE: *Proof of - Guilty knowledge - Accused attempting to run away when stopped by police - Whether conclusive proof of guilty knowledge*

The accused was charged for the offence of trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), punishable under s. 39B of the DDA. A police ambush was set up pursuant to information received and the accused was arrested while allegedly trying to run away after the car he was driving was blocked by the police. According to prosecution witnesses, the accused was arrested about one metre from the car. Drugs were found in a shoe-box that was kept in the boot of the car. There was, however, a contradiction in the evidence of the prosecution witnesses. Whilst one police officer by the name of Zaiton Mohd Noor (PW3) said that she opened one of the three packages in the shoe-box wherein substances suspected to be drugs were found, another police officer testified that PW3 opened all three packages found in the shoe-box.

To prove possession, the prosecution adduced evidence that the accused was not only the driver of the car in question but also the owner thereof. The prosecution relied on the evidence of one Zulkifli Hamat (PW2), an assistant enforcement officer in the Road Transport Department, who tendered two computer printouts which listed certain particulars.

As the trial was at the close of the prosecution case stage, the court had to determine whether a *prima facie* case had been made out based on the facts as stated.

Held:

[1] No evidence was adduced by the prosecution as to the relative positions of the car, the police officers and the accused to dispose of any doubt that the accused might well have come out of the car in response to PW3's approach. One metre from the car is not such a distance from the car as to clearly evidence an attempt to distance himself from the car. In the circumstances, it cannot be concluded that the accused was in fact attempting to run away. In any event, the single fact that the accused tried to run away is not conclusive as to incriminating or guilty knowledge.

[2] Police officers, particularly those involved in enforcement and investigation, have little excuse not to be observant and precise about the facts. Certainly they can expect to be called upon to give evidence in court. Recognising that they may be involved in the investigation of more than one case, thereby giving rise to some confusion, police officers are required to keep diaries and they are allowed to refer to the diaries to refresh their memories. The nature of the contradiction in the instant case could not be explained away and no effort was made to correct the discrepancy by reference to their diaries. The contradiction could have been cleared up by reference to their diaries if any were maintained. The lackadaisical, apathetic and unconcerned approach in giving evidence, resulting in the wholly needless contradictions, could not be condoned and accepted as immaterial and to be used to base a conviction upon.

[3] Although PW2 came to give evidence, there was no oral evidence adduced to show if the document was produced by the computer in the course of its ordinary use so as to be admissible under s. 90A(1) of the Evidence Act 1950. Neither was there any evidence by way of a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used as provided by s. 90A(2) of the Evidence Act 1950. The condition precedent not having been complied with, the document is not

evidence of the facts stated therein. Without the additional evidence to link the accused to the suspect substance through ownership of the car, he is simply the driver of the car in question.

[4] While a driver may be in custody and control of the car he is driving, the failure to prove he has the requisite knowledge of the dangerous drug means that possession is not proved against him. A car not being 'anything whatsoever containing' the dangerous drug, or 'premises', the presumptions under ss. 37(d) and 37(g) of the DDA do not apply.

[5] Given that the Criminal Procedure Code does not provide a definition of *'prima facie'*, leaving therefore its meaning and standard of proof required open to interpretation, the accused ought to be given the benefit of an interpretation more favourable to him. That would mean applying the beyond reasonable test.

[6] A reasonable doubt is where the evidence is credible, probable, plausible or logical that a reasonable person, having regard to the ordinary course of nature or natural events, human conduct, and in the particular circumstances of the particular case, would accept it as to act upon it as having occurred or been proven to have occurred, or as truthful or accurate; and not any doubt that could, with the application of some ingenuity, be conjured up, envisioned or visualised.

[7] In the instant case, there were unexplained contradictions as well as inconsistencies that engenders doubt as to the credibility of material prosecution witnesses. There were gaps in the prosecution evidence. These contradictions, inconsistencies and gaps dismiss any preliminary assumption that the prosecution evidence is accurate or true.

[Order of acquittal recorded.]

Case(s) referred to:
Abdullah Zawawi Yusoff v. PP [1993] 3 MLJ 1 ***(foll)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 ***(refd)***
Gan Soo Swee & Anor v. Ramoo [1969] 1 MLJ 59 ***(refd)***
Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 ***(refd)***
Haw Tua Tau v. PP [1981] CLJ 123 ***(refd)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 ***(refd)***
Lt Kol Yusof Abdul Rahman v. Kol Anuar Md Amin & Anor [1997] 2 CLJ 752 ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Munusamy v. PP [1987] 1 CLJ 250 ***(refd)***
PP v. Pandian Jayabalan FTCT 45-27-97 ***(refd)***
PP v. Sheikh Islammydin Sheikh Asradin (Perak CT 58-3-93) ***(refd)***

a *PP v. Lin Lian Chen [1992] 1 AMR 46:253* ***(refd)***
Syed Ali Syed Abdul Hamid & Anor v. PP [1982] 1 MLJ 132 ***(foll)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 ***(refd)***
Tong Peng Hong v. PP [1955] 21 MLJ 232 ***(refd)***
Saminathan & Ors v. PP [1955] 21 MLJ 121 ***(refd)***

b **Legislation referred to:**
Criminal Procedure Code (Cap 6), ss. 180(i), 182A
Dangerous Drugs Act 1952, ss. 37(d), 39B
Evidence Act 1950, 90A(1), (2)

For the solicitor - Mohd Saman Mohd Ramli DPP
c *For the accused - Gurbachan Singh; M/s Bachan & Kartar*

Reported by S Dharmendran

JUDGMENT

d **Abdul Wahab Patail J:**

The accused, Teh Eng Wah, is charged for the offence of trafficking, punishable under s. 39B of the Dangerous Drugs Act 1952 (DDA) as follows:

> *e* Bahawa kamu pada 8.11.1997 jam lebih kurang 10.30 p.m., berhampiran perhentian teksi, di hadapan Bank Bumiputra, Jalan Tuanku Abdul Rahman, dalam Bandaraya Kuala Lumpur dalam Wilayah Persekutuan telah mengedar dadah berbahaya iaitu 45.3 gram monoacetylmorphines dan oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

f The prosecution case is that pursuant to information received by A/ASP Zaiton bt Mohd Noor (PW3) that a trafficking transaction will be carried out in front of Bank Bumiputra at Jln Tuanku Abdul Rahman, involving a white Proton Aeroback car with registration number CAC 4631, a police ambush was set up at the said location; and the accused was arrested while trying to run away after the car he was driving, being as described, was blocked by the police *g* after he had stopped at the bus stop in front of Bank Bumiputra at Jln Tuanku Abdul Rahman. Substance (suspect substance) suspected to be heroin was found in the boot of the car packed in 180 sealed plastic packets wrapped in 18 newspaper wrapped packages, further wrapped, half a dozen in each of 3 plain brown paper packages, and placed in a shoe box with the brand name *h* 'Camel'.

The prosecution in this regard relies primarily upon the evidence of PW3.

PW3 had said that after she had introduced herself as "police", the accused opened the door of the car and attempted to run away. She said:

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> ... dan perkenalkan diri. Pada masa itu pemandu CAC 4631 membuka pintu keretanya dan terus keluar dan lari. Lebih kurang 3 langkah dari kereta itu, anggota saya dapat tangkap dia. Dia Seorang lelaki Cina. Sgt. Ruslan dan Insp. Shaiful yang menangkapnya.

Insp. Shaiful Idzam bin Hj. Sulaiman (PW4) gave evidence that he arrested the accused about 1 meter from the car. It was suggested in cross-examination that the accused was not attempting to run away. However no evidence was adduced by the prosecution as to the relative positions of the car, the police officers and the accused as to dispose of any doubt that the accused might well have come out of the car in response to PW3's approach. One meter from the car is not any distance from the car as to clearly evidence an attempt to distance himself from the car. In the circumstances I cannot conclude that the accused was in fact attempting to run away.

In any event, the single fact that the accused tried to run away is not conclusive as to incriminating or guilty knowledge. In *Abdullah Zawawi bin Yusoff v. PP* [1993] 3 MLJ 1 SC:

> We now come to what does seem to us to be evidence of a potent kind against the appellant, namely his conduct in taking to his heels upon Insp. Mat Yusoff announcing the discovery of the drugs at the box. This conduct of the appellant was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt.
>
> On the other hand, it was conduct equally consistent with the appellant having been in a state of pure panic, bearing in mind that it was only after Insp. Mat Yusoff announced the discovery of the drugs that the appellant took to his heels. An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way. It is true that the appellant himself denied running away but we agree with the judge that the appellant lied on this point, but this does not preclude us from drawing such inferences as may be justified from the evidence adduced by the prosecution. The Jamaican Privy Council case of *DPP 'v. Brooks,* cited to us.

Concern arises from the fact that PW4 had also contradicted PW3 as to the inspection conducted upon the contents of the 'Camel' brand shoe-box found in the boot of the car CAC 4631. PW3 had said in evidence emphatically that she conducted a quick inspection, and after opening one brown package and finding in it six newspaper wrapped packages containing ten sealed plastic packets each of suspected substance, she had ordered the accused and the exhibits to be taken to the police station. She had then driven CAC 4631 with the accused guarded by two policemen in the back seat to the station.

PW4 on the other hand gave evidence in examination-in-chief that he was present with the accused as PW3 opened the packages and found 180 sealed plastic packets containing suspect substance:

> Seterusnya ASP Zaiton ambil dan buka kotak kasut tersebut dihadapan saya dan OKT dan saya lihat didalam kotak kasut tersebut terdapat 3 bungkusan kertas berwarna kuning langsat. Seterusnya ASP Zaiton buka setiap bungkusan dan dapati didalam setiap bungkusan terdapat enam bungkusan mengandungi 10 paket plastik berisi bahan2 serbuk dan ketulan berwarna merah jambu disyaki dadah heroin.
>
> Jumlah dalam setiap bungkusan kertas berwarna kuning langsat ialah 60 paket plastik berisi bahan dan serbuk ketulan berwarna merah jambu disyaki dadah heroin.
>
> Jumlah keseluruhannya bagi ketiga2 bungkusan ialah 180 paket plastik ...

Police officers, particularly those involved in enforcement and investigation have little excuse to not to be observant and precise about the facts. The circumstances of an ambush may give or warrant even less excuse. Certainly they can expect to be called upon to give evidence in court. Recognising that they may be involved in investigation of many more than one case, where some confusion might arise therefrom, police officers are required to keep diaries, and they are allowed to refer to the diaries to refresh their memories. The nature of the contradictions above cannot be explained away and no effort was made to correct the discrepancy by reference to their diaries. I have no doubt that the contradiction can be cleared up by reference to their diaries if any is maintained. But the lackadaisical, apathetic, unconcerned approach in giving evidence, resulting in these wholly needless contradictions cannot be condoned and accepted as immaterial and to be used to base a conviction upon. To condone it will result in the perpetuation of such undesirable attitude.

In reviewing the evidence, it is also noted PW 3 stated in examination-in chief that:

> Selepas periksa kereta, saya telah membawa kotak kasut Camel dan kandungan serta wang tunai rampasan ke pejabat saya di tingkat 6 di Jabatan Narkotik.
>
> Saya arahkan OKT di tempatkan di lokap sementara ditingkat 6.
>
> Saya telah membuka semua ketiga2 bungkusan dalam kotak kasut untuk pemeriksaan lanjut. Disaksikan oleh OKT dan dua orang anggota saya yang ikut tadi dalam CAC 4631 ...

If the accused was sent to the temporary lock-up, his presence with the two policemen as PW3 opened the packages to inspect the contents is completely unexplained. Remaining unexplained, an inconsistency remains in the evidence of PW3.

PW3 had proceeded to mark, according to her evidence all the exhibits. She identified the 18 newspaper wrapped packages as having been marked by her with her signature, and the date 8 November 1997. She then handed over the exhibits to Insp. Wan Roslan bin Wan Ab. Rahman (PW1). According to PW1, he marked the exhibits with his signature, the date 9 November 1997 and the Dang Wangi Report number DW 28162/97.

This identification by marking gathers importance because while SP1, SP3, SP4, Encik Chong Yong Kiong (SP7) and C/Insp. Andrew Veno (SP8) gave evidence in court, and the latter two in their respective chemist and fingerprint reports, the suspect substance is described as 'granular and powdery' or 'ketulan dan serbuk', the request by SP1 dated 9 November 1997 described the suspect substance as 'serbuk', meaning powdery. This inconsistency gives rise to greater concern because it was not sent together with the exhibits to the chemist until 6 January 1998. In the meantime for more than a month, the exhibits were with SP8 who was unable to lift any fingerprints from the various packages comprising the exhibits. The acknowledgment of receipt by the chemist (P7) diminishes greatly in its value since the chemist according to his evidence in examination-in-chief, which remained unclarified:

> On 6 January 1998 at about 11.42 am I received from Inspector Wan Roslan bin Wan Ab. Rahman a package marked 'A' and sealed 'Federation of Malaya Police 24'. After checking through the Police 31 form, I issued a receipt to Insp. Wan Roslan bin Wan Ab. Rahman ...

P7 then serves only as acknowledgment of receipt of a package so marked as verified, but not necessarily of the contents. When the package was opened later, the chemist found its contents in the form of 'granular and powdery substance', and not as identified by the operative document referring the same to him, which describes the substance as 'serbuk' or 'powder'. Nevertheless he made no comment, suggesting he might not have been aware of the discrepancy.

The markings by PW3 and PW1 might have been of value to bridge the gap, but itself contains a gap. Whilst PW1 and PW3 had testified to placing their signatures, date and DW 28162/97 upon the exhibits, it turns out that exh. P11C5 contained one signature. It was not identified whose signature was on the document and whose signature is missing.

There is then an underlying foundation of contradictions and inconsistencies in the prosecution case.

Assuming for the moment the suspect substance is a dangerous drug within the meaning of the first schedule to the DDA, there is no evidence linking the accused to the drugs found in the boot of the car wrapped in newspaper which are further wrapped into three plain brown packages and placed in the CAMEL brand shoe box, other than the fact that he is the driver of the car. He was not seen handling the box at any time. His fingerprints were not shown to be found on the packages or any of the 180 plastic packets: see exh. P16. There is at least an equal likelihood he may not have touched the box or knew of its contents, in which case the benefit of the doubt must go to him.

The prosecution sought to prove possession by the accused by seeking to adduce evidence that the accused was not only the driver of the car but was also the owner of the car. The prosecution relied upon the evidence of PW1 and Zulkifli bin Hamat (PW2), an assistant enforcement officer in the Jabatan Pengangkutan Jalan Raya. The evidence of PW1 that the accused is the owner relies on what he was told, and although not objected to, is hearsay and not admissible as to the truth of it substance. Inadmissible evidence does not become admissible merely because it was not objected to. To my mind the failure to object was regrettable as objection would help confine the record of proceedings as clearly as possible upon the relevant and admissible evidence only, and ultimately assist greatly in the meticulous consideration of the evidence.

PW2 brought the record of registration of the white Proton Aeroback with registration number CAC 4631. Exhibit P9 is titled 'Senarai Butir-butir Insuran dan Kenderaan CAC 4631. A more complete printout is put into evidence by PW2 as exh. P17. It lists Teh Eng Wah, holder of Identity Card No. A3142972 of Jalan Tiong, Kuala Lumpur at the top of the page, presumably as the owner. The right of ownership itself is stated to be claimed:

Hakmilik Dituntut:	BBMB KEWANGAN BHD
No Siri Tuntutan:	11190

Incidentally, other than the fact the accused Teh Eng Wah was found driving the car CAC 4631 registered to a Teh Eng Wah, there is no evidence of any identity card number or address to link the accused to the Teh Eng Wah in exh. P9 and P17. Counsel did not object to the admissibility of P9 and P17, as he ought to have done. However, it was raised in submission that P9 and P17 cannot be accepted as evidence since the requirements of sub-ss. (1) and (2) of s. 90A of the Evidence Act 1950 has not been complied with.

Section 90A(1) and (2) of the Evidence Act 1950 is as follows:

> 90A. Admissibility of documents produced by computers, and of statements contained therein.
>
> (1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.
>
> (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

Although PW2 came to give evidence, there was no evidence adduced if the document was produced by the computer in the course of its ordinary use so as to be admissible under s. 90A(1) by way of oral evidence or any evidence by way of a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used as provided by s. 90A(2). The condition precedent not having been complied with, the document is not evidence of the facts therein: *Gnanasegaran Pararajasingam v. PP* [1997] 4 CLJ 6 CA; *PP v. Pandian a/l Jayabalan* FTCT 45-27-97.

Without the additional evidence to link the accused to the suspect substance through ownership of the car, he is simply in my view the driver of the car CAC 4631. While there is evidence that PW3 went to the boot area and was able to cause the boot to be opened, there was no evidence to show how this was effected. In particular there is no evidence in this case if the accused was in a position to open the boot area of the car.

It is trite law that circumstantial evidence, if relied upon, must point irresistibly to the guilt of the accused. It is equally obvious whilst a driver may be in custody and control of the car he is driving, the failure to prove he has the requisite knowledge of the dangerous drug means that possession is not proved against him. A car not being 'anything whatsoever containing' the dangerous drug, or 'premises', the presumptions under ss. 37(d) and 37(g) DDA do not apply. *Syed Ali bin Syed Abdul Hamid & Anor v. PP* [1982] 1 MLJ 132 FC in so holding also held that the ordinary boot of the car is not a specially constructed compartment specially constructed to conceal within the meaning

of s. 37(h). *Tong Peng Hong v. PP* [1955] 21 MLJ 232 and *PP v. Sheikh Islammydin bin Sheikh Asradin* (Perak CT 58-3-93) reached similar conclusions. *Tong Peng Hong v. PP* was followed by the Federal Court in *PP v. Lin Lian Chen* [1992] 1 AMR 46:253.

The ownership of CAC 4631 by the accused not having been formally proved, the above leads me to conclude there are gaps in prosecution case. There is no evidence of a link between the accused and the drugs found in the boot of the car.

As required by s. 180(i) of the Criminal Procedure Code FMS Cap 6, the Court must decide at the close of the prosecution case whether the prosecution has made out a *prima facie* case. What is the standard of proof required to prove a *prima facie* case? What is clear is that there is no definition of the term in the Code, and the term itself provides no indication whether the standard is proof on a balance of probabilities or beyond reasonable doubt. Usage of the term in our case-law has to be resorted to for guidance. The usual meaning ascribed to it is 'on the face of it' or 'at first glance': see *Tan Boon Kean v. PP* [1995] 4 CLJ 456; [1995] 3 MLJ 514 FC; *Lt. Kol Yusof bin Abdul Rahman v. Kol Anuar bin Md Amin & Anor* [1997] 2 CLJ 752; [1997] 1 MLJ 562 CA. If one were to quibble perhaps 'primarily on the face of it' is closer to the literal meaning. The '*prima facie* test' is probably best stated by Azmi FCJ in *Munusamy v. PP* [1987] 1 CLJ 250; [1987] 1 MLJ 492 FC:

> On the assumption that the prosecution evidence was accurate, could the accused be lawfully convicted?

Peh Swee Chin FCJ in *Dalip Bhagwan Singh v. PP* [1998] 1 MLJ 1 FC; [1997] 4 CLJ 645 FC, referring to the above passage said:

> It would not do any violence to the language to say that the word 'accurate' could mean 'true' in the above quotation. It would also not be off the mark to say the words 'prosecution evidence' in the same quotation refer to the evidence of 'primary facts' mentioned by Lord Diplock who held that the prosecution made out a case by adducing such evidence of primary facts in Haw Tua Tau (at p 51). Such evidence of primary facts could logically refer to evidence or evidence sufficient enough to prove each ingredient of an offence, such as death as one of the ingredients in a murder case. Once there is sufficiency of such evidence, so long as it is not inherently incredible such as the landing of a flying saucer from outer space on Dataran Merdeka in Kuala Lumpur, a *prima facie* case is made out. In concluding on the sufficiency of such evidence to satisfy the said ingredients, there will be sometimes a lot of rejection of irrelevant or inadmissible evidence.

The test then, is not merely to see if the evidence is not inherently incredible. *Dalip Bhagwan Singh v. PP* requires an evaluation of sufficiency of evidence in respect of all the elements of the charge after rejection of irrelevant and inadmissible evidence. Distinguishing *Haw Tua Tau v. PP* [1981] 2 MLJ 49, and following *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151; [1994] 1 MLJ 269 and *Arulpragasan a/l Sandaraju v. PP* [1996] 4 CLJ 597; [1997] 1 MLJ 1 the Court of Appeal in *Lt. Kol Yusof bin Abdul Rahman v. Kol Anuar bin Md A Amin & Anor* [1997] 1 MLJ 562 CA, held that the degree of proof required to establish a *prima facie* case is proof beyond all reasonable doubt. To digress for a moment, such a standard avoids the lacuna where an accused adduces no evidence after the defence has been called. In such a case, if the accused elects to remain silent and calls no evidence, the prosecution's case remains unrebutted and the court has to convict on the very same material.

Indeed the conclusion of the Court of Appeal would accord with the meaning of the term *'prima facie'* as used by Azmi FCJ in *Tan Boon Kean v. PP* [1995] 4 CLJ 456; [1995] 3 MLJ 514 FC:

'Prima facie', means on the face of it or at first glance. So, 'a *prima facie* case' is a 'case which is sufficient to call for an answer. While *prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive' (see the *Oxford Companion to Law* at p. 987). '*Prima facie* evidence' is evidence where 'a party's evidence in support of any issue is so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence' (see *Cross on Evidence* (2nd edn) at pp. 24 and 25; and also per Wee Chong Jin CJ in *Gan Soo Swee & Anor v. Ramoo* [1969] 1 MLJ 59 at p. 61). In our view, under s. 180, a *prima facie* case is one which is established by sufficient beyond reasonable doubt evidence and can be overthrown only by rebutting evidence adduced by the other side, so as to cast a reasonable doubt on the prosecution case as to the guilt of the accused.

Given that the code does not provide a definition of *'prima facie'*, leaving therefore its meaning and the standard of proof required open to interpretation, the accused ought to be given the benefit of an interpretation more favourable to him. That would mean applying the beyond reasonable doubt test.

The effect of the amendments to s. 180 and 182A of the code is essentially therefore to designate the action at the end of the prosecution case as 'determining whether there is a *prima facie* case', and at the conclusion of the trial, where the evidence of both parties has been heard as 'determining whether the prosecution has proved its case beyond reasonable doubt'.

It is trite that 'beyond reasonable doubt' does not mean 'beyond a shadow of a doubt'. The term was well dealt with in the judgment of Buhagiar J in *Saminathan & Ors v. PP* [1955] 21 MLJ 121, and quoted extensively in *Lt. Kol Yusof bin Abdul Rahman*. What is a reasonable doubt has been admirably explained by Denning J in *Miller v. Minister of Pensions* [1947] 2 All ER 372, 373:

> ... need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.'

It would not do any violence to the above if the difference between 'fanciful' and 'reasonable' is viewed as whether the evidence is credible, probable, plausible or logical that a reasonable person, having regard to the ordinary course of nature or natural events, human conduct, and in the particular circumstances of the particular case, would accept it as to act upon it as having occurred or been proven to have occurred, or as truthful or accurate; and not any doubt that could, with the application of some ingenuity, be conjured up, envisioned or visualized.

In this case, there are unexplained contradictions as well as inconsistencies that engenders doubt as to the credibility of material prosecution witnesses. There are gaps in the prosecution evidence. These contradictions, inconsistencies and gaps dismisses any preliminary assumption that the prosecution evidence is accurate or true (*Munusamy v. PP; Dalip Bhagwan Singh v. PP*). There are indeed too many questions left open that the Court is unable to conclude there is a sufficiency of evidence assumed to be accurate or true as to arrive at a finding that the prosecution has made out a *prima facie* case against the accused as required by s. 180 para. (i) of the Code. Given these clear contradictions, inconsistencies and gaps as to the involvement of the accused with the suspect substance, be it by way of possession or trafficking, it is unnecessary for the court to proceed to a detailed evaluation of the chemist's evidence. In the circumstances I am compelled by sub-para. (ii) thereof to record an order of acquittal.